

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|-------------------------------|
| JOHN MARKLEY |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket Nos. 177,638 & 177,639 |
| BRUMBACK & ATKINSON CONSTRUCTION |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| CIGNA INSURANCE |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| KANSAS WORKERS COMPENSATION FUND |) | |

ORDER

The Kansas Workers Compensation Fund appeals from an Award entered by Administrative Law Judge Steven J. Howard on October 15, 1996. The Appeals Board heard oral argument April 3, 1997.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, John I. O'Connor of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Robert V. Talkington of Iola, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board included transcripts of the depositions of John Markley taken on March 30, 1994, and January 17, 1995; preliminary hearing of July 27, 1993; regular hearing of June 6, 1996; deposition of Sergio Delgado, M.D., of

August 27, 1996; deposition of Edward J. Prostic, M.D., of August 1, 1995; and, the settlement hearing held July 31, 1995.

ISSUES

All issues between claimant and respondent were settled at a hearing held on July 31, 1995. Issues between the respondent and Kansas Workers Compensation Fund were reserved for decision by the Administrative Law Judge. The Administrative Law Judge found 100 percent of the liability on both Docket Nos. 177,638 and 177,639 should be assessed against the Kansas Workers Compensation Fund. The Fund appeals from that finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge assessing 100 percent of the liability in both Docket Nos. 177,638 and 177,639 should be affirmed.

Claimant alleges personal injuries by accident in the course of his employment on April 27, 1993, and in May 1993. He filed separately docketed claims for each date of injury. The respondent and Fund have stipulated that respondent's insurance carrier paid a total of \$50,404.07 on these claims.

The evidence establishes that claimant had a low-back surgery in 1992, prior to either of the two alleged injuries at issue here. Both of the physicians who testified in these cases agreed that prior to the injury in this case claimant had permanent impairment. The Fund does not argue that respondent did not have the requisite knowledge of a preexisting handicap. The sole issue on appeal is whether the preexisting handicap caused or contributed to the injuries in this case. K.S.A. 1992 Supp. 44-567.

Both Dr. Prostic and Dr. Delgado gave opinions on the issue. Dr. Prostic testified that claimant's injury of April 27, 1993, would not have occurred but for the preexisting handicap. He also testified that the May 1993 accident resulting in impairment would not have occurred but for the 1992 injury and the April 1993 injury. Dr. Delgado, on the other hand, testified that there was no additional permanent impairment from the April 27, 1993, and May 1993 injuries.

After reviewing the record, the Appeals Board agrees with the conclusion by the Administrative Law Judge adopting the opinions and testimony of Dr. Prostic. Dr. Delgado acknowledged increased symptomatology but attributes it to a psychological condition. He testified that the psychological condition resulted from the injuries in April and May of 1993. Accordingly, even if Dr. Delgado's opinion were accepted, it suggests additional disability in 1993. The Appeals Board concludes that the injuries sustained in April and May of 1993

would not have occurred but for claimant's preexisting handicap. The Award by the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard dated October 15, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John I. O'Connor, Pittsburg, KS
Robert V. Talkington, Iola, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director